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No. 93-1797

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

INSURANCE COMPANY OF NORTH AMERICA, *et al.*,
Petitioners,
v.
MORTON INTERNATIONAL, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE INSURANCE ENVIRONMENTAL LITIGATION ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Insurance Environmental Litigation Association ("IELA"), by its undersigned attorneys, hereby moves the Court for leave, pursuant to Rule 37 of the Rules of the Supreme Court of the United States, to appear as *amicus curiae* in support of the Petition for a Writ of *Certiorari*. IELA is an association of major property and casualty insurers which, since 1986, has participated as *amicus curiae* in more than 260 cases in nearly seventy state and federal courts addressing environmentally related insurance coverage cases. This is IELA's first filing in support of *certiorari*.

IELA's motion and the accompanying conditionally filed brief are submitted within the time specified by Rule 37.2. The written consent of all the petitioners, as well as of respondents Underwriters at Lloyd's, London, and Certain Subscribing London Market Insurance Companies and Affiliated FM Insurance Company accom-

panies this motion and the proposed brief. Respondent Morton International, Inc. has refused to consent to the filing of the proposed brief.

This case jeopardizes the health of the domestic and worldwide insurance and reinsurance markets. The payment of literally hundreds of millions of dollars turns on the New Jersey court's decision in *Morton*—a decision reached in a manner that utterly deprived the insurer parties of their due process rights under the United States Constitution. The decision will also have immense consequences for future insureds who will bear the financial burden of the liability coverage created by the procedurally flawed *Morton* decision. Insurers and reinsurers who never agreed to cover the risks imposed by *Morton* will be forced to devote funds covering other risks to pay what amounts to a pollution tax decreed by the New Jersey court in an adjudication devoid of procedural safeguards.

The effect of *Morton* also is to deprive the petitioners and each of IELA's members of their contractual property rights without due process. The *Morton* court denied the party insurers notice and an opportunity to be heard on the "regulatory estoppel" issue upon which the decision turned—an issue that arose only when the court raised it *sua sponte* in its decision on the merits. Through this blatant denial of the most fundamental due process protections, the *Morton* court deprived insurers of valuable property and contract rights by taking from them the right to rely upon and enforce an insurance policy provision precluding liability coverage for harms caused by gradual pollution discharges.

IELA members, most of whom have regularly used the pollution exclusion clause at issue here in New Jersey and throughout the nation, are painfully aware that the petition before the Court involves a dispute of huge proportions. More than $100 billion is at stake in the debate

over the application of the pollution exclusion at issue, and this case is a key component in the $480 billion to $1 trillion controversy about who will pay to clean up America. The preservation of the due process rights guaranteed to all civil litigants is now very much at risk in the nationwide struggle over insurance coverage for environmental harms given the decision below.

As an association representing most of the nation's major property and casualty insurers,* IELA is uniquely positioned to demonstrate to the Court how failure to overturn *Morton* would countenance a serious violation of due process and could have a dramatic adverse effect on insurers worldwide.

WHEREFORE, the Insurance Environmental Litigation Association respectfully requests that this Court grant its motion for leave to file an *amicus curiae* brief in support of the Petition for a Writ of *Certiorari*.

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* IELA submits this motion and proposed brief on behalf of IELA members Aetna Life and Casualty Company, Allstate Insurance Company, Chubb Group of Insurance Companies, Continental Insurance Company, Crum & Forster Corporation, Fireman's Fund Insurance Companies, Hanover Insurance Company, Home Insurance Company, Maryland Insurance Group, Prudential Reinsurance Company, Royal Insurance Company, St. Paul Companies, Selective Insurance Group of America, State Farm Fire & Casualty Company, The Travelers Insurance Companies, United States Fidelity & Guaranty Company, and Zurich-American Insurance Group. IELA member Liberty Mutual Insurance Company and affiliates of IELA members American International Group, CIGNA Property and Casualty Companies, and Hartford Insurance Group are petitioners; accordingly, this motion and proposed brief are not submitted on their behalf. Petitioners Continental Casualty Company and General Accident Insurance Company of America and respondents Underwriters at Lloyd's, London, and Certain Subscribing London Market Insurance Companies and Affiliated FM Insurance Company are not members of IELA.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE INSURANCE ENVIRONMENTAL LITIGATION ASSOCIATION IN SUPPORT OF PETITIONERS

Amicus Curiae The Insurance Environmental Litigation Association ("IELA") hereby supports the petition for a writ of *certiorari* to review the judgment of the Supreme Court of New Jersey in this case.

INTEREST OF THE *AMICUS CURIAE*

This case is crucial to IELA's members. It deprives them of their contractual property rights without due process, and jeopardizes the health of the domestic and worldwide insurance and reinsurance markets. IELA is an association of major property-casualty insurers which, since 1986, has participated as *amicus curiae* in more than 260 cases addressing environmentally related insurance coverage cases. The importance of this case prompts IELA to make its first filing in support of *certiorari*.[1]

Most IELA members have regularly used the pollution exclusion at issue here throughout the nation. More than $100 billion is at stake in the debate over the exclusion's application,[2] and this case is a key component in the $480 billion to $1 trillion controversy about who will pay to clean up America. While state courts interpret the pollution exclusion in hundreds of cases nationwide, the preservation of the core requisites of due process is plainly within the province of this Court. IELA believes it is uniquely positioned to demonstrate to the Court how

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[1] For a list of IELA members on whose behalf this brief is filed, *see* the attached Motion for Leave to File Brief *Amicus Curiae*.

[2] The definition of the words "sudden and accidental," especially "sudden," has been said to be a $100 billion question. Gary Spencer, *Pollution Coverage Suit Reinstated Against Insurer*, N.Y.L.J., Nov. 15, 1989, at 1.

failure to overturn *Morton* would countenance a serious violation of due process and could dramatically, adversely, and improperly affect insurers worldwide.

SUMMARY OF THE ARGUMENT

The decision below is not a conventional contractual adjudication between an insurer and its policyholder. Here, a state supreme court acknowledged that the contracts at issue exclude coverage for pollution damage. Nonetheless, the court imposed vast pollution liability upon all insurers doing business in New Jersey, "finding," without notice, hearing, or evidence, that the "insurance industry" somehow misrepresented the impact of the admittedly "plain and unambiguous" pollution exclusion to expert state insurance regulators who consequently approved the exclusion without an appropriate rate adjustment. This perplexing, fact-bound conclusion was reached, *sua sponte*, only at the second level of appellate review, and the petitioners were denied any opportunity for factual refutation. Indeed, the New Jersey court based its "fact-finding" primarily on articles written by lawyers who represent large industrial companies like respondent Morton International, Inc. ("Morton") in disputes with insurers.

Insurance cannot operate with economic rationality if courts disregard policy limitations and grant insurance coverage *ex post facto*. As the California Supreme Court has noted, judicially created insurance leaves "ordinary insureds to bear the expense of increased premiums necessitated by the erroneous expansion of their insurers' potential liabilities." *Garvey v. State Farm Fire & Casualty Co.*, 770 P.2d 704, 711 (Cal. 1989). Here, the erroneous expansion was both huge and unanticipated and could severely and adversely affect the price and availability of insurance for millions of Americans.

Critically, these harmful consequences would result from a state court proceeding that afforded the petitioners

not one *scintilla* of due process protection. Like criminal defendants, government employees, and other property owners, insurers should have the right, disregarded here, to present their evidence and to test their adversaries' evidence in an impartial hearing before they are faced with negative legal consequences. Without an evidentiary hearing, the court estopped the entire "insurance industry" from enforcing the exclusion at issue. Its refusal to consider the circumstances of the individual litigants, some of whom had no connection at all with the alleged misrepresentations, highlights its desire to achieve a legislative redistribution of funds without the even-handed adjudication mandated by the Fourteenth Amendment.

This Court has long held that "[w]hether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Brinkerhoff-Faris Trust and Sav. Co. v. Hill*, 281 U.S. 673, 682 (1930) (Brandeis, J.). Here, the New Jersey court, after conceding that the pollution exclusion gives rise to a valuable property right, has nonetheless deprived *all* insurers of "existing remedies" for enforcing that right. And, in contravention of the Fourteenth Amendment, the court has done so without affording insurers any "real opportunity" to protect that valuable property right.

New Jersey would receive a parochial benefit under *Morton* for use in remedying the state's pervasive environmental problems. But the national and international costs of the New Jersey Supreme Court's approach are severe: insurers and reinsurers that never agreed to cover damages from gradual pollution and, consequently, never collected premiums for such risks, will be forced to use funds supporting other risks to pay a state pollution tax not sanctioned by the legislature or tested by due process adjudication. Accordingly, this case plainly merits a grant of *certiorari*.

REASONS FOR GRANTING THE WRIT

I. *MORTON* THREATENS SERIOUS HARM TO THE DOMESTIC AND WORLDWIDE INSURANCE AND REINSURANCE MARKETS.

The New Jersey court's decision to override the plain terms of the insurance contracts could, if not reversed, financially impair insurers here and abroad. The enormous costs of cleaning up all hazardous waste sites substantially exceed the total reserves of all insurers. *Morton* suggests that the supposedly "deep pocket" of insurers should be picked by "equitable" sleight-of-hand notwithstanding clear contractual limitations on insurance coverage. If this tempting rationale is extended to the hundreds of cases nationwide involving the pollution exclusion at issue, insurers will be stuck with massive unfunded—and potentially unfundable—liabilities.

A. Shifting The Huge Costs Of Environmental Cleanup To Insurers As *Morton* Proposes Could Endanger The Insurance Mechanism.

The nationwide costs of environmental cleanup, imposed retroactively under a variety of state and federal environmental statutes,[3] are so enormous that insurers could not possibly bear them even if they had agreed to cover risks of this type. But where they did not agree to cover, or charge premiums for, the risks that the decision below would force them to bear, the monumental economic impact is intolerable.

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[3] Among these statutes are the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9657 (1988 & Supp. IV 1992) ("CERCLA"), which includes the Superfund program; state statutes that resemble CERCLA, and other applicable federal and state statutes, such as the New Jersey Industrial Site Remediation Act, 1993 N.J. Laws ch. 139. Private rights of action have also become the basis for huge environmental cleanup liabilities. The dispute in *Morton* arises under the New Jersey Spill Compensation and Control Act of 1976, N.J.S.A. §§ 58:10-23.11 to -23.24 (1992) ("Spill Act").

1. *The Threat* Morton *Poses to Domestic Insurers.*

Morton has the potential economic force of one hundred hurricanes. Hurricane Andrew was "by far the most expensive catastrophe ever for insurers in the United States." [4] Yet Andrew's total covered loss of $7.3 billion is dwarfed by the cost of cleaning up the nation's hazardous waste sites—estimated to be between $480 billion and $1 trillion.[5] By contrast, insurers' surplus to secure *all* risks, not just environmental ones, is estimated at $157 billion—less than one-third the most conservative estimate of the cost of remediating America's waste problem.[6] Although Congress is now considering reform of the Superfund program,[7] such reform would not eliminate the threat to insurers posed by *Morton*. Even if enacted, it would leave untouched a myriad of other federal and state environmental enforcement mechanisms, such as the New Jersey Spill Act under which the environmental liabilities in *Morton* arose.

Insurers assume certain risks defined by their policies in return for premiums. Premiums are calculated by equalizing the predictable, but unpredictably distributed,

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[4] Peter Kerr, "Insurers' Florida Tab: $7.3 Billion," New York Times, Sept. 2, 1992, at D1.

[5] Milton Russell, E. William Colgazier, & Mary R. English, *Hazardous Waste Remediation: The Task Ahead*, University of Tennessee Waste Management Research and Education Institute 15-16 (Dec. 1991).

[6] *See, e.g.*, Christopher Dauer, *Pollution Liability Threatens Solvency*, National Underwriter, Aug. 24, 1992, at 1, 20 (comparing the $700 billion to $1 trillion in costs to domestic insurers' $157 billion surplus); *Insurer Liability for Cleanup Costs at Hazardous Waste Sites: Hearing Before the Subcomm. on Policy Research and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 2d Sess. 50 (1990) (GAO statement that the projected cost of CERCLA alone is as much as five times the total surplus of U.S. property-casualty insurers).

[7] *See* H.R. 3800, "Superfund Reform Act of 1994," 103d Cong., 2d Sess. (1994).

costs of covered occurrences incurred by the policyholders within the risk pool. Through actuarial science, insurers are able to respond to the random catastrophes that strike individuals precisely because, on a large scale, the frequency of such events becomes reasonably predictable.[8]

In order to spread risks rationally, insurers must set contractual boundaries on their overall coverage obligations.[9] When those boundaries are ignored *ex post facto*, insurers bear liabilities for which they have collected no premiums and established no reserves. Under favorable market conditions, where all insurers are affected, these liabilities may be shifted partially to future policyholders. But even given this best-case assumption, imposition of massive gradual pollution cleanup liability under *Morton* would invade the insurer surplus substantially and grossly distort the insurance mechanism. And, in any event, *Morton* will force policyholders nationwide to subsidize New Jersey's cleanup efforts.

Also, while reinsurance practices are designed to ameliorate insurers' risks, *Morton* in fact aggregates the beneficial function of reinsurance. Reinsurers also rely on the meaning of the underlying insurance contract to estimate the risks they will undertake and to set the premiums charged to insurers. *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2915 (1993) ("[T]he scope and predictability of the risks assumed in a reinsurance contract depend entirely upon the terms of the primary policies that are reinsured."). Retroactive expansion of policy coverage, whether by a court or by a legislature, undercuts these calculations. Thus, reinsurance participation redistributes but does not lessen the pain of *Morton*-like decisions.

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[8] *See generally* Robert E. Keeton & Alan I. Widiss, *Insurance Law* § 1.3(b), at 12-13 (West 1988).

[9] *See, e.g.*, Note, *Insurance as Contract: The Argument for Abandoning the Ambiguity Doctrine*, 88 Colum. L. Rev. 1849, 1860-61 (1988).

2. *The Threat* Morton *Poses to Foreign Insurers.*

The effect of expansive United States liability and coverage decisions on British and other foreign insurers and reinsurers has been well-documented.[10] Much of Lloyd's of London now teeters on the brink of bankruptcy, in part because of insurance coverage created by courts in the United States to pay environmental cleanup costs.[11]

Under the circumstances, some foreign insurers understandably view decisions like *Morton* as a form of expropriation by American courts under the false color of contract adjudication. Whether as insurers or as reinsurers, these carriers have entered into contracts that plainly and unambiguously preclude coverage for environmental claims, other than those arising from a "sudden and accidental" discharge. These terms, as *Morton* agreed, "virtually eliminate[] pollution-caused property-damage . . . coverage" except for the classic "accident" or "boom" event. Ptr. App. 36a.

When presented with Morton's gradual pollution claims, its insurers properly denied coverage based on this policy language. They were then called upon to defend their decision in a court in New Jersey, the nation's most polluted state.[12] They defended the denial of coverage by

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[10] *See* Brief of Respondents Underwriters at Lloyd's, London, and Certain Subscribing London Market Insurance Companies, and Affiliated FM Insurance Company in Support of Petition for a Writ of *Certiorari* 1-4 (May 27, 1994).

[11] *See, e.g.*, Richard Lapper, *Business and the Environment: Stuck with the Bill—Europe's Insurers Could Learn from US Experience*, Financial Times, May 6, 1992, at 14 (Lloyd's faces "potentially crippling losses" if United States courts continue to interpret policy language so as to order insurers to pay to clean up polluted sites).

[12] New Jersey is the state with the most hazardous waste sites on EPA's National Priority List for the Superfund program, with almost ten percent of the national total. EPA, National Priorities List for Uncontrolled Hazardous Waste Sites, 59 Fed. Reg. 8,724, 8,729 (Feb. 23, 1994).

pointing to, among other things, the six state supreme courts [13] and numerous state intermediate appellate courts [14] and federal courts of appeals [15] that have read the word "sudden" in the pollution exclusion as necessarily referring to an event that occurs quickly, hastily, immediately, or abruptly.

The New Jersey Supreme Court agreed that the exclusion's language plainly warranted denial. Nonetheless, the court estopped the entire "insurance industry" from relying on the exclusion to deny coverage for unintentional gradual pollution, Ptr. App. 86a-92a, based on a determination that the expert state insurance regulators who approved this unquestionably clear exclusion in 1970 were somehow fooled about what it meant. Ptr. App. 51a.[16] The court proposed and adopted this novel "regulatory estoppel" theory *sua sponte*. Also, without permitting the petitioners to create an evidentiary record in rebuttal, *Morton* relied on the characterization of selected documents in articles written by counsel who regularly represent policyholders in insurance coverage litigation. It then labelled these articles "independent commentary" and determined that a hearing was unnecessary.[17] What

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[13] These include the highest courts in Florida, Massachusetts, Michigan, New York, North Carolina, and Ohio.

[14] These include courts in California, Indiana, Iowa, Kansas, Maryland, Minnesota, Oregon, Pennsylvania, and Utah.

[15] These include the First, Second, Third, Fourth, Sixth, Eighth, Ninth, Tenth, and D.C. Circuits.

[16] On rehearing, the petitioners submitted affidavits from former state insurance regulators contradicting these "findings." *See* Pet. 24-29; Ptr. App. 51a, 232a-248a. Because the regulatory estoppel theory was raised *sua sponte*, late in the litigation, the *Morton* court could not consider these affidavits.

[17] Ptr. App. 35a ("[W]e are persuaded that a remand would be redundant, and that this record together with the reported cases that address the regulatory history and the abundant independent

is worse, New Jersey courts are now extending the scope of this ruling, by applying it to non-New Jersey cases. *See Continental Ins. Co. v. Beecham, Inc.*, 836 F. Supp. 1027, 1040 (D.N.J. 1993) (applying *Morton* where the dispute had only a tenuous connection to New Jersey, based on a choice-of-law analysis elevating New Jersey's policy interest of favoring policyholders over another state's interest in "[i]nterpreting insurance contracts to mean what they say.").

At a minimum, such extraordinary procedures fail to inspire confidence in the fairness of American courts.[18] This Court's review is needed to restore the faith of insurers, foreign and domestic, that the United States will not tolerate potentially expropriatory state actions without assurance by this Court of compliance with due process requirements.

B. The Value Of Insurance Contracts Nationwide Is At Risk If Insurers May Be Deprived Without Due Process Of The Benefit Of Regulatory Approved Exclusions.

Spurred on by *Morton*, policyholders are now seeking to extend the "regulatory estoppel" theory to other states

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commentary on the subject affords an accurate and comprehensive basis for our determination.").

To illustrate, among the articles the *Morton* court relied on were Robert D. Chesler *et al.*, *Patterns of Judicial Interpretations of Insurance Coverage for Hazardous Waste Site Liability*, 18 Rutgers L.J. 9 (1986), and George Pendygraft *et al.*, *Who Pays For Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation*, 21 Ind. L. Rev. 117 (1988). Each of these articles, like others the court cited, states clearly that its author "regularly represents policyholders in coverage disputes." *Cf.* Ptr. App. 36a-52a.

[18] The Court has recognized that adhering to the requirements of due process is especially important when dealing with foreign entities. *See, e.g., Asahi Metals Industry Co. v. Superior Court*, 480 U.S. 102, 115-16 (1987).

and even other policy provisions.[19] Although their success has thus far been limited, some courts are sorely tempted to grasp at any theory or truncated procedure that might finance pollution remediation in their proverbial backyard.

The Louisiana Supreme Court's recent decision in *South Central Bell Telephone Co. v. Ka-Ton Food Stores*, No. 93-CC-2926, 1994 WL 201749 (La. May 24, 1994), illustrates the potentially far-reaching effects of the *Morton* "estoppel" rationale.[20] That case addressed a pollution exclusion providing that

> this policy does not apply . . . to any . . . property damage arising out of the actual, alleged or threatened discharge, dispersal, spill, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials . . . or other irritants, contaminants or pollutants . . . at or from premises owned, rented or occupied by the named insured.

Id. at *1, *3. This provision was drafted in 1985 to make absolutely certain that all damages arising from pollution were excluded from coverage. *Id.* at *7 ("The 'absolute' exclusions eliminated the 'sudden and accidental' exception to the exclusion, and clearly stated that environmental cleanup expenses were not covered damages."). Louisiana's state insurance regulators, like those of almost every other state, approved the new exclusion.

Acknowledging that the absolute exclusion is "clear and explicit," *id.* at *7, the Louisiana court refused to enforce it literally based on "equitable considerations."

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[19] *See* Pet. 13 & n.17; *see, e.g., St. Paul Fire & Marine Ins. Co. v. Warwick Dyeing Corp.*, No. 93-1721 (1st Cir.); *Downtown Airpark, Inc. v. Continental Ins. Co.*, No. 93-6144 (10th Cir.).

[20] The Supreme Court of Pennsylvania recently agreed to hear a case presenting the issue whether insurers should be allowed to "enforc[e] a policy exclusion in a manner different than was represented to gain approval for the exclusion's use." *Central Dauphin Sch. Dist. v. Pennsylvania Mfrs'. Ass'n Ins. Co.*, No. 552 M.D. Alloc. Dkt. 1993, 1994 Pa. LEXIS 155 (Pa. May 16, 1994) (per curiam).

Id. at *9. Citing *Morton*, and similarly injecting on appeal *sua sponte* an estoppel issue, the Louisiana court held that the insurer's right to enforce the exclusion would depend on its historic disclosure and premium adjustment practices, regardless of compliance with Louisiana regulatory requirements. *Id.* at *10.

Thus, under *Morton* and its misguided progeny, the insurer always loses. If policy language does not unequivocally preclude coverage, coverage is premised on "ambiguity." If the policy plainly does preclude coverage—as in *Morton* and in *Ka-Jon*—then insurers are "estopped" from achieving this disfavored result. The finality of the regulatory process is swept aside; judgment lies against insurers simply because they are labelled "bad actors." Review by this Court of *Morton* is needed to ensure that courts do not proceed without due process, many years after the fact, to deprive insurers of the benefit of their clearly drafted exclusions.[21]

II. THE WAY THE *MORTON* COURT ARRIVED AT ITS "REGULATORY ESTOPPEL" RULE VIOLATED FUNDAMENTAL PRINCIPLES OF DUE PROCESS.

Reasoned adjudication requires, at a minimum, that courts afford litigants an opportunity to present evidence to the adjudicator, who bases the ultimate factual decision on that evidence alone. In addition, due process in contract cases compels courts to determine disputes under the agreement between the parties, and not to undertake a broad reordering of private resources.

Even beyond its massive financial consequences, review of this case is warranted. First, the New Jersey Supreme

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[21] The insurer-always-pays rationale embodied by *Morton* also directly conflicts with Congress's judgment, embodied in section 107(e) of CERCLA, 42 U.S.C. § 9607(e), to preserve the agreements of private parties to insure, to hold harmless, or to indemnify one another in connection with environmental liabilities arising out of CERCLA. *See generally Mardan Corp. v. CGC Music, Inc.*, 804 F.2d 1454, 1458-59 (9th Cir. 1986).

Court disregarded due process, denying the petitioners notice and an opportunity to be heard. Second, *Morton* did not simply adjudicate the contract dispute before it. Instead, *Morton* redistributes immense sums from insurers that did not accept (and did not collect premiums for) certain risks to entities saddled with the huge costs of remediating soil and water contamination. *Morton*'s result —confiscation, without due process, of valuable vested property rights—is not a legitimate exercise of state judicial power.

A. *Morton*'s Disregard Of The Petitioners' Due Process Rights And Its Purported Application Of A Rule To The Entire "Insurance Industry" Reveal That It Was Not Acting In A Manner Appropriate To A Court.

Insurance policies, "being contracts, are property and create vested rights." *Lynch v. United States*, 292 U.S. 571, 577 (1934) (Brandeis, J.). Insurers may not be divested of these rights without due process of law. Here, without notice, hearing, or evidentiary record, the New Jersey Supreme Court estopped the entire "insurance industry" from enforcing what the court acknowledged was the plain meaning of a very valuable, State-approved, policy exclusion. Moreover, treating the entire "industry" as a monolithic entity, and refusing to consider the varying facts and circumstances of individual insurers and their relationships with their policyholders, highlight the illegitimacy of the *Morton* court's actions.

1. *In Arriving at its Regulatory Estoppel Theory, the Morton Court Wrongly Denied the Petitioners Notice and an Opportunity to be Heard.*

This Court has long held that " '[t]he fundamental requisite of due process of law is the opportunity to be heard.' " *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). "While 'many controversies have raged about . . . the Due Process Clause,'

. . . it is fundamental that . . . due process requires that when a State seeks to terminate an interest such as that involved here, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective." *Bell v. Burson*, 402 U.S. 535, 542 (1971) (quoting *Mullane*, 339 U.S. at 313). Where a case "has been decided against [a litigant] without his even having had the proper opportunity to present his evidence," he is "deprived of due process of law contrary to the Fourteenth Amendment." *Saunders v. Shaw*, 244 U.S. 317, 319 (1917) (Holmes, J.).

As demonstrated at greater length in the petition for *certiorari*, *Morton* ignores or contravenes these fundamental rights in numerous ways:

- It invoked *sua sponte* a legal theory (*i.e.*, equitable estoppel) neither alleged nor pursued by the respondent at any stage. Pet. at 1, 5.
- It based its estoppel holding on a New Jersey decision neither cited nor argued by Morton nor any of its *amici*. Pet. at 8; *see* Ptr. App. 88a-89a (relying on *Harr v. Allstate Ins. Co.*, 255 A.2d 208 (N.J. 1969)).
- It imposed an estoppel even though there was no opportunity to develop an evidentiary record on any of the factual elements of estoppel under New Jersey law. Pet. at 23-29. There was no discovery as to those elements; neither the trial court nor the intermediate appellate court made any findings or reached conclusions on those elements. Pet. at 5, 24-29.
- The court made *de novo* factual determinations based on case reports, partisan articles in journals, and other non-evidentiary material, in the absence of any evidentiary record on issues of estoppel. Pet. at 2, 8.
- It also perused case reports instead of creating an adequate evidentiary record. None of these decisions relied upon by the court was: (1) decided

in terms of equitable estoppel or the New Jersey regulatory process; (2) based upon an evidentiary hearing on the so-called "regulatory history" of the pollution exclusion; or (3) entitled to treatment as res judicata. Pet. at 18.

- Relying on non-evidentiary materials, it asserted that a remand to develop an evidentary record on issues of fact that were, in actuality, highly disputed would be "redundant." Pet. at 1-2, 9 & n.10, 14.[22]

The Court should grant the petition to signal disapproval of the constitutionally flawed *Morton* procedures.[23]

2. *The* Morton *Court's Refusal to Consider the Individual Circumstances of Various Insurers Confirms that the Court Was Acting Illegitimately.*

While the evidence, if fairly examined, would show that *no* insurer should be estopped on the basis of the challenged communications to the state regulators, *Morton* did not even adhere to its own faulty "rationale"—that insurers that allegedly misled state regulators about the meaning of the pollution exclusion in 1970 should be punished by being deprived of the exclusion's protection. *Morton* should logically not affect insurers who had nothing to do with the 1970 presentation. Yet, it simply disregarded that some insurers entered the New Jersey mar-

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[22] Also, the *Morton* court impermissibly "probe[d] the mental process of" state insurance regulators, many years after the fact, in contravention of this Court's rule in *United States v. Morgan*, 313 U.S. 409, 422 (1941); *see New Jersey Turnpike v. Sisselman*, 255 A.2d 810, 815 (N.J. Super. Ct. App. Div.), *certif. denied*, 258 A.2d 16 (N.J. 1969) (adopting *Morgan* rule).

[23] The Attorney General of New Jersey recently contended that only this Court could ameliorate any constitutional deficiencies that may invalidate the *Morton* decision. *See* Brief of *Amicus Curiae* State of New Jersey, Dep't of Environmental Protection and Energy at 12-13, *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Sur. Co.*, Nos. 93-5777, 93-5794 (dated June 2, 1994). Copies of this Brief have been lodged with the Court for its convenience.

ket after the pollution exclusion had been approved by New Jersey regulators. Other insurers never joined the Insurance Rating Board ("IRB"), which made the communications at issue. *Morton*'s failure to consider the circumstances of individual litigants demonstrates its departure from the requisites of due process.

The so-called "London Market Insurers" (Certain Underwriters at Lloyd's, London, and Certain London Market Insurance Companies), which had nothing to do with the submission of the 1970 pollution exclusion to state regulators, asked the *Morton* court to clarify, on reconsideration, that its opinion did not apply to them.[24] The *Morton* court refused. Ptr. App. 198a-201a; *see* Brief of Respondents in Support of Petition for a Writ of *Certiorari* 1-2 ("At an elementary level, . . . in order for a claim of estoppel to be made against a party, that party must have had some communication with the regulators on the matter for which estoppel is sought."). Accordingly, review of the case is necessary to reaffirm the principle that the individual circumstances affecting each party are to be fairly considered in reasoned adjudication.

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[24] Motion for Partial Reconsideration and Clarification at 12-13, 14-15 (Aug. 30, 1993). Specifically, the London Market Insurers argued that it would be "fundamentally unfair" to apply any estoppel against them given that (a) they had never been members of the IRB (which had made the allegedly "deceptive" representations in the early 1970s); (b) they had never been members of any of the IRB's successors; (c) their policies rarely contained the "sudden and accidental" language; and (d) their policies at issue in *Morton* did not contain that language. In fact, *all* of the London Market policies in issue had expired before 1970—*i.e.*, before the pollution exclusion had even been proposed to the states. Copies of this Motion have been lodged with the Court for its convenience.

B. The Due Process Clause Forbids Procedurally Deficient Judicial Actions Whose Effect Is To Rewrite Contracts Or Expropriate Valuable Property Rights.

The Constitution establishes procedural protection for private contract rights by ensuring that they can be compromised in only two fundamental ways. A court can alter such rights equitably, so long as it complies with the requisites of due process (and, where appropriate, the Takings Clause); or, in certain circumstances, the state legislature may modify such rights, within the limits of the Due Process, Takings, and Contracts Clauses. As to legislation, property owners can repair to the democratic process to protect their property.

Morton is rooted in a legislative-like policy determination to vitiate vital provisions of all the insurance agreements at issue, unjustifiably shifting insurer assets to policyholders.[25] Stripped of their rights to notice and a hearing, insurers face the uncompensated deprivation of their property without either due process or the opportunity to participate in the democratic process. This plainly unconstitutional result necessitates examination by this Court.

The Court has repeatedly recognized that "[a]ny significant taking of property by the State is within the purview of the Due Process Clause." *Connecticut v. Doehr*, 111 S. Ct. 2105, 2115 (1991). *See also TXO Prods. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2718 n.17 (1993) (Constitution forbids "taking of . . . property without due process"). Because "[v]alid contracts are property," *Lynch*, 292 U.S. at 579 (Brandeis, J.), they may not be abrogated without due process. Where a contractual relation has arisen, "the right to enforce it, hav-

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[25] *Cf. City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978) (overturning New Jersey Supreme Court decision upholding state legislation banning the importation of solid waste on the grounds that this Court "has consistently found parochial legislation of this kind to be constitutionally invalid.").

ing become vested, comes within the protection of . . . the due process of law clause in the Fourteenth Amendment, of the Federal Constitution." *Coombes v. Getz*, 285 U.S. 434, 448 (1932).

State courts thus cannot "deprive [an entity] of property without affording it at any time an opportunity to be heard in its defense." *Brinkerhoff-Faris Co.*, 281 U.S. at 678 (Brandeis, J.). A state court cannot deprive an owner of property rights where it "has denied . . . due process of law—using that term in its primary sense of an opportunity to be heard and to defend its substantive right." *Id.* Such a deprivation is grave, because "[c]ontracts between individuals or corporations are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened." *Lynch*, 292 U.S. at 580.

The petitioners' rights under the pollution exclusion in their contracts are valuable (if intangible) assets.[26] The pollution exclusion blocks coverage for massive unfunded liabilities. IELA members have issued thousands of insurance policies containing this or similar clauses in New Jersey and throughout the nation, and are defending more than one hundred cases nationwide under those clauses. The pollution exclusion is therefore an asset with enormous real worth, and *Morton* unquestionably affects its value in every pending case.

Here, the New Jersey court affirmed that, under the insurance policies' plain language, the insurers had the vested contractual rights that they claimed. Ptr. App. 33a-34a. "When a right has arisen upon a contract . . . and has been so far perfected that nothing remains to be done by the party asserting it, . . . [i]t has become a vested right which stands independent[ly]." *Coombes*, 285

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[26] *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) (property rights are based on "an individual entitlement grounded in state law" and include "varied and, as often as not, intangible" interests).

U.S. at 445. Yet, through *Morton*, New Jersey deprived *all* insurers of the right to enforce this vital part of their contracts without affording them basic procedural protections.

Morton is an unjustifiable deprivation of vested property rights by means of lawmaking that is at its core legislative, not judicial. *Ettor v. City of Tacoma*, 228 U.S. 148, 155 (1913). Had *Morton*'s seizure of property been accomplished by the New Jersey legislature,

> the transgression of the due process clause of the Fourteenth Amendment would be obvious. The violation is none the less clear when that result is accomplished by the state judiciary. . . . The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government.

Brinkerhoff-Faris Co., 281 U.S. at 679-80 (Brandeis, J.) (citations omitted).

Morton's contention that the pollution exclusion is unenforceable, because of alleged misrepresentations when it was introduced, does not evade the requirement that insurers be accorded due process before their property is taken. Insurers and insureds have relied on the provision in negotiating premiums ever since its approval by New Jersey regulators. The Constitution "prohibits (or requires compensation for) all retroactive laws that destroy vested rights." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 856 (1990) (Scalia, J. concurring). "[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring). *Morton*'s invalidation, decades after the fact and without key procedural safeguards, of an insurer's right to enforce the contract's recognized meaning calls upon this Court to grant the insurers' petition. *See Lynch*, 292 U.S. at 576.

CONCLUSION

For all of the foregoing reasons, the Court should grant the petition for *certiorari*.

Respectfully submitted,

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